

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of)

Petition of AT&T Inc. for Forbearance
Under 47 U.S.C. § 160(c) from Title II
and *Computer Inquiry* Rules with
Respect to Its Broadband Services)

WC Docket No. 06-125

Petition of BellSouth Corporation for
Forbearance Under Section 47 U.S.C.
§ 160(c) from Title II and *Computer
Inquiry* Rules with Respect to Its
Broadband Services)

MAILED

OCT 19 2007

FCC

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 2007

Released: October 12, 2007

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements;
Commissioners Copps and Adelstein dissenting and issuing a joint statement.

TABLE OF CONTENTS

	Para.
I. INTRODUCTION	1
II. BACKGROUND	3
A. Regulatory Requirements	3
1. Title II Requirements	3
2. <i>Computer Inquiry</i> Requirements	6
B. Prior Broadband Relief	8
III. DISCUSSION	12
A. Introduction	12
B. Scope of Petitions	13
C. Application of the Statutory Forbearance Criteria	16
1. Dominant Carrier Regulation	17
2. <i>Computer Inquiry</i> Requirements	52
3. General Title II Economic Regulation	64
4. Public Policy Regulation	71
IV. EFFECTIVE DATES	76
V. ORDERING CLAUSES	77

APPENDIX - Commenters

I. INTRODUCTION

1. In this Order, we address petitions filed by AT&T and Legacy BellSouth (jointly AT&T), requesting that the Commission forbear, pursuant to section 10 of the Communications Act of 1934, as

amended (Communications Act or Act),¹ from applying Title II of the Act and the *Computer Inquiry* rules to certain broadband services.² Verizon's forbearance petition was "deemed granted" on March 19, 2006. AT&T seeks relief comparable to the relief granted Verizon through that deemed grant.³ For the reasons set forth below, we grant substantial forbearance relief to AT&T with regard to its existing packet-switched broadband telecommunications services and its existing optical transmission services.⁴ We also relieve AT&T of its obligations under the *Computer Inquiry* rules in connection with these services, conditioned on its compliance with the *Computer Inquiry* obligations that apply to all non-incumbent local exchange carrier (LEC), facilities-based wireline carriers.⁵

¹ 47 U.S.C. § 160. Congress enacted section 10 as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

² Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (filed July 13, 2006) (AT&T Petition); Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (filed July 20, 2006) (BellSouth Petition). The Wireline Competition Bureau (Bureau) invited comment on each of the petitions. See *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, 21 FCC Rcd 7942 (WCB 2006); *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, 21 FCC Rcd 8022 (WCB 2006). We note that AT&T's merger with BellSouth was approved by the Commission on December 29, 2006, five months after AT&T filed the forbearance petition that is the subject of this Order. See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (*AT&T-BellSouth Order*).

³ See Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (*March 20 News Release*); Petition of the Verizon Telephone Companies For Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004) (Verizon Petition).

⁴ For ease of exposition, we refer to the services for which we grant relief as the "the AT&T-specified services." We describe these services more fully in part III.D.1.a, below. They exclude all traditional, TDM-based, DS1 and DS3 services, and all services that do not provide a transmission capability of over 200 kilobits per second (kbps) in each direction. See, e.g., AT&T Petition at 5; Legacy BellSouth Petition at 7-8; Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 12, 2007) (AT&T Sept. 12, 2007 *Ex Parte* Letter) (withdrawing its request for forbearance with respect to broadband services provided on an interstate interexchange basis that are subject to relief in the Commission's *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; 2000 Biennial Regulatory Review *Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175; *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, Report and Order and Memorandum Opinion and Order, FCC 07-159, at para. 85 (rel. August 31, 2007) (*Section 272 Sunset Order*)); Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 7, 2007) (AT&T Sept. 7, 2007 *Ex Parte* Letter) (excluding virtual private network (VPN) services from requests for forbearance); cf. Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440, at 3 (filed Feb. 7, 2006) (Verizon WC Docket No. 04-440 Feb. 7, 2006 Letter) (circumscribing scope of Verizon's forbearance petition). TDM is an abbreviation for time division multiplexing, which combines multiple individual communications between two locations over a single channel by dividing the channel into distinctly allocable time segments.

⁵ Specifically, we grant, with regard to the AT&T-specified services, forbearance from the requirements contained in section 203 of the Act, 47 U.S.C. § 203, section 214 of the Act, 47 U.S.C. § 214, (as it relates to dominant carriers), and the following sections of the Commission's rules: 47 C.F.R. §§ 61.31-59 (general rules for dominant carriers), 47 C.F.R. § 63.71 (to the extent it provides discontinuance rules for domestic dominant carriers), 47 C.F.R. Part 69 (access charge and pricing flexibility rules), as well as *Computer Inquiry* requirements.

2. In all other respects, AT&T's requests for forbearance are denied. In particular, we do not forbear from any statutory or regulatory requirement that applies to common carriers or LECs generally regardless of whether they are incumbents or competing carriers. Nor do we forbear, except as stated above with regard to the *Computer Inquiry* rules, from any statutory or regulatory requirements that apply to AT&T in its capacities as an incumbent LEC or a Bell Operating Company (BOC), or to AT&T's affiliate, Southern New England Telephone Company (SNET), in its capacity as an independent incumbent LEC. In addition, AT&T must continue to meet its public policy obligations under Title II and the Commission's implementing rules with respect to the services at issue.⁶ This preserves important public policies related to 911, emergency preparedness, customer privacy, and universal service in connection with the broadband services for which we grant relief. The limited forbearance relief granted herein does not affect in any way the full force and effect of the merger conditions adopted in the *AT&T/BellSouth Order*.⁷

II. BACKGROUND

A. Regulatory Requirements

1. Title II Requirements

3. Title II of the Act and the Commission's implementing rules impose both economic and non-economic regulation on common carriers. Generally speaking, the most extensive regulations are imposed on dominant carriers (*i.e.*, those with individual market power). These carriers are subject to price cap or rate-of-return regulation, and must file tariffs for many of their interstate telecommunications services – on either seven or fifteen days' notice – and usually with supporting data.⁸ In contrast, nondominant carriers are generally not subject to direct rate regulation and may file tariffs, on one day's notice and without cost support, which are presumed lawful.⁹ In addition, applications to discontinue, reduce, or impair service are subject to a 60-day waiting period for dominant carriers, as opposed to a 31-day period for nondominant carriers.¹⁰ Finally, dominant carriers must follow more stringent procedures under section 214 of the Act for certain types of transfers of control for which nondominant carriers are accorded presumptive streamlined treatment.¹¹

4. The Act and our rules impose additional obligations on the BOCs, independent incumbent LECs, or incumbent LECs generally. Under section 271 of the Act, BOCs were required to demonstrate compliance with certain market-opening requirements, including, *inter alia*, interconnection and nondiscriminatory access to network elements, directory assistance, databases and signaling before providing in-region, interLATA long distance service.¹² The BOCs must continue to comply with such

⁶ See, e.g., 47 U.S.C. §§ 222, 225, 229, 251(a)(2), 254, 255.

⁷ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5807-25, Appendix F (2007) (*AT&T/BellSouth Order*).

⁸ See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997) (*Tariff Streamlining Order*); see also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241, para. 40 (1999) (*Pricing Flexibility Order*) (allowing price cap LECs to file tariffs for new services on one day's notice), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁹ 47 C.F.R. §§ 1.773(a)(ii), 61.23(c); *Tariff Filing Requirements for Nondominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995).

¹⁰ 47 C.F.R. § 63.71(c).

¹¹ 47 C.F.R. § 63.03(b).

¹² See 47 U.S.C. § 271.

market-opening requirements.¹³ Independent incumbent LECs, moreover, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.¹⁴ Incumbent LECs must meet additional obligations, including the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.¹⁵

5. In addition to the economic regulation described above, Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and protect consumers.¹⁶ These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,¹⁷ ensure access to telecommunications services by people with disabilities,¹⁸ meet standards regarding the privacy of their customers' information,¹⁹ and facilitate the delivery of emergency services.²⁰ All common carriers, moreover, are subject to a formal complaint process under which any person may complain to the Commission about anything the carrier may do that is contrary to the provisions of the Act.²¹

2. Computer Inquiry Requirements

6. Facilities-based wireline carriers are also subject to *Computer Inquiry* requirements. In the *Computer II Orders*,²² the Commission, in response to the convergence and increasing interdependence of computer and telecommunications technologies, established a new regulatory framework that distinguishes between "basic services" and "enhanced services."²³ The Commission determined that

¹³ See 47 U.S.C. § 271(d)(6).

¹⁴ See 47 C.F.R. § 64.1903.

¹⁵ 47 U.S.C. § 251(c).

¹⁶ See *infra* n.213.

¹⁷ 47 U.S.C. § 254(d).

¹⁸ 47 U.S.C. § 225.

¹⁹ 47 U.S.C. § 222(a)-(c), (f).

²⁰ 47 U.S.C. § 222(d)(4), (g).

²¹ 47 U.S.C. § 208.

²² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II Orders*).

²³ The Commission defined basic services as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 FCC 2d at 415-16, para. 83, 420, para. 96. Enhanced services, in turn, were defined as services that "combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Computer II Final Decision*, 77 FCC 2d at 387, para. 5. In other words, an "enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* at 420, para. 97. Although the Commission used the term "enhanced service" in its *Computer Inquiry* decisions and the Act uses the term "information service," the Commission has determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [the] *Computer II* proceeding . . ." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 992-94 (2005) (*NCTA v. Brand X*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998) (*Report to Congress*).

enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I of the Communications Act.²⁴ To protect against anti-competitive behavior, the Commission, pursuant to this ancillary jurisdiction, imposed structural separation requirements on AT&T.²⁵ The Commission required other facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.²⁶ These carriers thus must offer the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations.²⁷

7. In the *Computer III* proceedings,²⁸ the Commission replaced this mandatory structural separation regime with a regime that gives a BOC the option of providing enhanced services pursuant to nonstructural safeguards. In developing this regime, the Commission determined that the cost of decreased efficiency and innovation imposed by the structural safeguards of *Computer II* outweighed their benefits.²⁹ The *Computer III* framework maintained the existing basic and enhanced services categories.³⁰ It adopted comparably efficient interconnection (CEI), open network architecture (ONA),

²⁴ See, e.g., *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

²⁵ *Id.* at 467-68, para. 216.

²⁶ *Id.* at 475, para. 231; see *id.* at 435, para. 132 (discussing jurisdictional basis for the Commission's *Computer II* actions); see also *CCIA v. FCC*, 693 F.3d at 211-14 (affirming the Commission's reliance on its ancillary jurisdiction in imposing structural safeguards on AT&T's provision of enhanced services); *NCTA v. Brand X*, 545 U.S. at 996 (describing *Computer II* and stating that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

²⁷ See *CCIA v. FCC*, 693 F.2d at 205; see also *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation, in section 251(c)(3) of the Communications Act, that incumbent LECs provide access to unbundled network elements (UNEs). 47 U.S.C. § 251(c)(3).

²⁸ *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), further recon., 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), recon., 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); see also *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20, 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the open network architecture (ONA) framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

²⁹ See *Computer III Phase I Order*, 104 FCC 2d at 964, para. 3.

³⁰ *Id.* at 964, para. 4.

and other nonstructural requirements as alternatives to the *Computer II* structural separation requirements for the BOCs.³¹ Under *Computer III*, a BOC may provide enhanced services either directly or through an affiliate that is not a *Computer II* affiliate pursuant to an ONA or, alternatively, a CEI plan.

B. Prior Broadband Relief

8. In previous orders, the Commission has taken a number of important steps aimed at easing the regulatory requirements for broadband facilities and services. Specifically, in the *Triennial Review Order*, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including fiber-to-the-home (FTTH) loops in greenfield situations, broadband capabilities of FTTH loops in overbuild situations, the packet-switched capabilities of hybrid loops, and packet switching.³² In making its determination, the Commission considered, among other things, the directive of section 706 of the 1996 Act that it encourage the deployment of advanced services, and it concluded that these facilities should not be unbundled.³³ In subsequent reconsideration orders, the Commission extended the same unbundling relief to encompass fiber loops serving predominantly residential multiple dwelling units (MDUs) and fiber-to-the-curb (FTTC) loops.³⁴ Moreover, in the *Section 271 Broadband Forbearance Order*, the Commission granted the BOCs forbearance relief from the requirements of section 271 specifically for the broadband elements for which it had granted

³¹ *Id.* An ONA plan includes a description of how a BOC unbundles its network to enable its competitors to provide enhanced services generally. *Id.* at 1019-20, para. 113, 1064-67, paras. 214-19. A CEI plan includes a description of how a BOC unbundles its network to enable its competitors to provide a particular enhanced service or set of enhanced services that the BOC intends to provide. *Id.* at 1055-56, paras. 190-91.

³² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, paras. 272-95, 17323, para. 541 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), cert. denied, 543 U.S. 925 (2004), on remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

³³ *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44. Section 706 states, in pertinent part:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"Advanced telecommunications capability" is defined . . .

with regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

47 U.S.C. § 157 nt.

³⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-20303, paras. 9-19 (2004) (*Triennial Review FTTC Reconsideration Order*).

unbundling relief under section 251.³⁵ The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.³⁶

9. In the *Wireline Broadband Internet Access Services Order*,³⁷ the Commission, among other things, generally eliminated the Title II and *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.³⁸ The Commission granted this relief for wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, an FTTC or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities.³⁹ The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode service (ATM), Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.⁴⁰ The Commission stated that carriers and end users traditionally have used these services for basic transmission purposes and that these services, unlike broadband Internet access services, are telecommunications services under the statutory definitions and thus subject to Title II.⁴¹

10. In the *Verizon Advanced Services Waiver Order*,⁴² the Commission granted a waiver of specific regulatory requirements to allow Verizon to exercise pricing flexibility for certain advanced

³⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Section 271 Broadband Forbearance Order*), *aff'd*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (*EarthLink v. FCC*).

³⁶ 47 U.S.C. § 157 nt.

³⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*), *pets. for review pending*, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

³⁸ *Id.* at 14872-915, paras. 32-111. The Commission found these services to be information services. *See id.* at 14909, para 102.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.* 47 U.S.C. § 153(43), (46). We note that issues relating to this framework are pending before the Commission in a number of proceedings. *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access Rates for Price Cap Local Exchange Carriers*) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, FCC 07-123 (rel. July 9, 2007); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*) (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services); *Computer III Further Remand Further Notice*, 13 FCC Rcd at 6046, para. 6 (inviting comment on whether the Commission should eliminate the ONA, comparably efficient interconnection (CEI), and other *Computer III* requirements).

⁴² *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005) (*Verizon Advanced Services Waiver Order*).

services that rely on packet technology.⁴³ Pricing flexibility relief allows a carrier the ability to provide tariffed services at volume and term discounts and under contract tariffs, whereby service offerings may be negotiated and tailored to meet customers' individual needs.⁴⁴ The Commission subsequently granted AT&T and Qwest similar relief for packet-based advanced services.⁴⁵

11. On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II of the Act and the *Computer Inquiry* rules to its broadband services.⁴⁶ On December 19, 2005, the Commission, pursuant to section 10(c) of the Act, extended by 90 days (until March 19, 2006) the date by which Verizon's petition would be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act.⁴⁷ By their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon's petition in part. Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission."⁴⁸ On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.⁴⁹ At that same time, the Chairman and other Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.⁵⁰

⁴³ Generally, price cap LECs may obtain pricing flexibility in two separate phases on a metropolitan statistical area (MSA) basis to respond to competition in markets that are sufficiently competitive to warrant this relief. See *Pricing Flexibility Order*, 14 FCC Rcd at 14234, 14257, paras. 24, 68. Specifically, the *Verizon Advanced Services Waiver Order* grants Verizon phase I pricing flexibility for the advanced services at issue in MSAs where Verizon previously had qualified for phase I or II pricing flexibility for other special access services. *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16840, para. 1.

⁴⁴ *Pricing Flexibility Order*, 14 FCC Rcd at 14287, 14291, paras. 122, 128. Under phase I relief, a price cap carrier may offer volume and term discounts and contract tariffs for certain interstate access services; however, to protect those customers that may lack competitive alternatives, the price cap LEC must continue to offer its generally available, price cap constrained (i.e., subject to part 61 and part 69) tariff rates for these services. 47 C.F.R. § 69.727(a); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2001, para. 17 (2005). Under phase II relief, part 69 rate structure requirements and price cap regulation are eliminated, and tariffs may be filed on one day's notice. 47 C.F.R. § 69.727(b).

⁴⁵ *SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules*, WC Docket No. 03-250, Order, 22 FCC Rcd 7224 (WCB 2007) (*SBC Waiver Order*); *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, WC Docket No. 06-187, Order, 22 FCC Rcd 7482 (WCB 2007) (*Qwest Pricing Flexibility Waiver Order*).

⁴⁶ See Verizon Title II and *Computer Inquiry* Forbearance Petition at 24.

⁴⁷ 47 U.S.C. § 160(c); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

⁴⁸ 47 U.S.C. § 160(c).

⁴⁹ *March 20 News Release*, pets. for review pending, *Sprint Nextel et al. v. FCC*, No. 06-1111 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2006).

⁵⁰ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, *Petition of the* (continued....)

III. DISCUSSION

A. Introduction

12. Based on our analysis of marketplace conditions for the services at issue here, we grant AT&T forbearance from the application of our dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control and certain *Computer Inquiry* requirements to broadband services with regard to (1) its existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) its existing non-TDM-based, optical transmission services. These services include Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services. This grant is restricted to services that AT&T currently offers and lists in its petitions, and excludes all TDM-based, DS1 and DS3 services.

B. Scope of Petitions

13. We begin our analysis by identifying the specific relief AT&T requests in its petitions, including the services, statutory provisions and Commission regulations that AT&T identifies in its petitions.⁵¹ As stated above, AT&T seeks relief comparable to that granted Verizon when its similar petition for forbearance was deemed granted.⁵² Specifically, AT&T requests relief from Title II and *Computer Inquiry* requirements for the broadband services specified in its petitions as well as for any additional interstate broadband services it may choose to offer in the future.⁵³ The requested relief from Title II includes the ability to offer any of the AT&T-specified services on a private carriage basis and free from the Commission's dominant carrier requirements.⁵⁴ AT&T also seeks relief from the *Computer Inquiry* rules, including the requirement that it separate out and offer any underlying transmission components of the AT&T-specified services on a common carrier basis.⁵⁵ AT&T does not seek relief from the Commission's universal service requirements.⁵⁶

14. The services for which AT&T seeks relief fall within two categories of telecommunications services capable of transmitting at speeds of 200 kilobits per second (kbps) in both directions: (1) packet-switched services, which route or forward packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, cells, or other data units; and (2) non-TDM-based optical networking, optical hubbing, and optical transmission services.⁵⁷

(Continued from previous page)

Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (rel. Mar. 20, 2006).

⁵¹ See, e.g., *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5214-15, para. 11 (2007) (*Qwest Section 272 Sunset Forbearance Order*); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27010, para. 18 (2002) (*SBC Advanced Services Forbearance Order*).

⁵² AT&T Petition at 8; Legacy BellSouth Petition at 8.

⁵³ See AT&T Petition at 1, 7-11 (seeking relief for itself and other BOCs); Legacy BellSouth Petition at 2, 6-9 (seeking relief for itself and similarly situated carriers).

⁵⁴ AT&T Petition at 9-10 (seeking the flexibility to provide its specified services on a common-carriage or private-carriage basis); Legacy BellSouth Petition at 6 (seeking relief for all Title II common carrier requirements).

⁵⁵ See, e.g., AT&T Petition at 10.

⁵⁶ AT&T Petition at 10; Legacy BellSouth Petition at 8.

⁵⁷ See AT&T Petition at 8-9; Legacy BellSouth Petition at 7-8.

AT&T identifies in its petitions certain specific interstate broadband telecommunications services that it currently offers and for which it seeks forbearance.⁵⁸ AT&T also seeks relief from Title II and *Computer Inquiry* regulation for any additional services it chooses to offer in the future that fit within either of these two categories of services.⁵⁹

15. On September 12, 2007, AT&T narrowed the scope of its forbearance request.⁶⁰ As the Commission has recognized, enterprise customers frequently purchase high-capacity transmission services, including Frame Relay, ATM, Gigabit Ethernet, and similar services provided via emerging technologies, as interstate interexchange services.⁶¹ In AT&T's September 12 filing, it recognizes that we granted AT&T relief from dominant carrier regulation of such interstate interexchange services in our recent *Section 272 Sunset Order*, subject to certain targeted safeguards and other continuing regulatory obligations.⁶² AT&T thus "withdraws its request for forbearance from Title II dominant carrier regulation of the broadband services described in its forbearance petitions to the extent that these services are provided on an interstate interexchange basis and are thereby subject to the relief previously granted in the Commission's *272 Sunset Order*."⁶³ Thus, to the extent that AT&T's original petitions encompassed interstate interexchange services, those requests for forbearance are no longer before us.

C. Application of the Statutory Forbearance Criteria

16. An integral part of the "pro-competitive, de-regulatory national policy framework"⁶⁴ established in the 1996 Act is the requirement, set forth in section 10 of the Communications Act, that the

⁵⁸ The AT&T and Legacy BellSouth petitions list the following services: Frame Relay Service, ATM Service, VPN Service, Remote Network Access Service, Ethernet-Based Service, Video Transmission Service, Optical Transport Service, Optical Networking Service, and Wave-Based Transport Service. AT&T Petition at Appendix A, Legacy BellSouth Petition at Attachment A. Subsequently, AT&T narrowed the scope of services for which forbearance is sought by AT&T and Legacy BellSouth to exclude VPN services. See AT&T Sept. 7, 2007 *Ex Parte* Letter. Collectively, we refer to these services as the AT&T-specified services. Verizon sought forbearance relief for its Frame Relay, Asynchronous Transfer Mode Cell Relay, Internet Protocol-Virtual Private Network, Transparent Local Area Network, LAN Extension, IntelliLight Broadband Transport, Custom Connect, Verizon Optical Networking, Optical Hubbing, and IntelliLight Optical Transport services. See Verizon WC Docket No. 04-440 Feb. 7, 2006 Letter at 2-4, 6.

⁵⁹ See AT&T Petition at 9, n.22 (stating that AT&T seeks forbearance for any service offered today or in the future by AT&T or any of its affiliates that fits within the two categories described by Verizon); Legacy BellSouth Petition at 8 n.19 (stating that it "seeks relief for not only the broadband services it currently provides but also new services that are introduced and fit within either of the two categories"). In contrast, Verizon restricted its forbearance request to ten of its then-existing telecommunications services offerings. See Verizon WC Docket No. 04-440 Feb. 7 Letter at Attach. 1, at 1 (providing "List of Broadband Services for Which Verizon Is Seeking Forbearance").

⁶⁰ AT&T Sept. 12, 2007 *Ex Parte* Letter.

⁶¹ *Section 272 Sunset Order*, FCC 07-59 at para. 28.

⁶² AT&T Sept. 12, 2007 *Ex Parte* Letter at 1; see also *Section 272 Sunset Order*, FCC 07-59. This includes relief from: tariff obligations (as set forth in Section 203 of the Act and sections 61.31-61.38 and 61.43 of the Commission's rules), interexchange basket requirements (as set forth in section 61.42(d)(4) of the Commission's rules), international service tariff filings (as set forth in section 61.28 of the Commission's rules), discontinuance and transfer of control requirements (as set forth in sections 63.03, 63.19, 63.21, 63.23, and 63.30-63.90 of the Commission's rules), contract filing and reporting for exchange of services and routing of traffic and rates (as set forth in section 43.51 of the Commission's rules), and structural safeguards (as set forth in section 272 of the Act and section 64.1903 of the Commission's rules). As noted above, this relief is conditioned on compliance with the conditions and requirements imposed in the *Section 272 Sunset Order*.

⁶³ AT&T Sept. 12, 2007 *Ex Parte* Letter at 1.

⁶⁴ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain findings with respect to such provisions or regulations.⁶⁵ Specifically, the Commission is required to forbear from any such provision or regulation if it determines that (1) enforcement of the provision or regulation is not necessary to ensure the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶⁶ In making this public interest determination, the Commission also must consider, pursuant to section 10(b), "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."⁶⁷

1. Dominant Carrier Regulation

a. Charges, Practices, Classifications, and Regulations

17. Section 10(a)(1) of the Act requires that we analyze whether the application of dominant carrier regulation to each of the services specified by AT&T is necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."⁶⁸ Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on AT&T's rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.⁶⁹ We conclude that, in light of the overall competitive alternatives available for the AT&T-specified services, as well as the way in which they are typically offered to enterprise customers, it is appropriate to forbear from dominant carrier regulation as it applies to these services. In particular, mandating that AT&T, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.

18. We begin our analysis by looking at the broadband services identified by AT&T and the customers that use them. These types of services are high-speed, high-volume services that enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data among multiple locations. For example, Frame Relay service allows local area networks to be connected across a

⁶⁵ 47 U.S.C. § 160(a).

⁶⁶ *Id.*

⁶⁷ 47 U.S.C. § 160(b). In its comments, the New Jersey Rate Counsel argues that exercise of the Commission's forbearance authority pursuant to section 10 of the Act violates separation of powers and equal protection, as well as the tenth and eleventh amendments of the Constitution. See New Jersey Rate Counsel Comments at 5-6. As we held in the *Qwest Section 272 Sunset Forbearance Order* in response to the same argument, the New Jersey Rate Counsel makes no attempt to develop this argument, and we find the assertion insufficient to call into question section 10's constitutionality. See *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5232, para. 49 n.139 (citing *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir. 2003) (Administrative Procedure Act does not require the Commission to respond to conclusory comments); *MCI WorldCom v. FCC*, 209 F.3d 70, 765 (D.C. Cir. 2000) (holding that a party did not raise an argument with sufficient force to obligate the Commission to respond); *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5282 n.469 (2003) (regulatory agencies are not required to address arguments not stated with sufficient force or clarity)).

⁶⁸ 47 U.S.C. § 160(a)(1).

⁶⁹ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

public network to carry customized data applications.⁷⁰ ATM service, which was developed more recently than Frame Relay, has greater availability in urban areas, is currently a widely-used carrier backbone technology, and can guarantee different service quality levels to meet various customer needs.⁷¹ This service offers high capacity and reliability by combining some circuit-switched functionality with packet-switching and is used to deliver data that requires a very low rate of transmission delays.⁷² Ethernet-based services provide high-speed, dedicated pathways for large applications, including engineering, medical imaging, and streaming video applications, and are often used as part of local area networks (LANs).⁷³

19. Non-TDM-based optical services are very high speed, fiber-based transmission services that, collectively, reflect many of the telecommunications transmission capabilities that technological advances have made possible. For example, AT&T's Optical Transport Services provide point-to-point connectivity using optical fiber, with customer interfaces operating at speeds ranging from OC-3 to OC-192.⁷⁴ Similarly, AT&T's Optical Networking Services provide optical transport within a closed ring architecture that enables automatic restoration upon link failure.⁷⁵ These services also provide for hubbing services, where individual optical transport links are multiplexed onto higher capacity optical links.⁷⁶ Moreover, AT&T's Ethernet services provide high-speed, point-to-point transmission using Ethernet protocol technology.⁷⁷ We find insufficient information to precisely define the market boundaries for such services, and we thus focus our analysis on the services AT&T identifies in the record generally.⁷⁸

20. We also find it appropriate, contrary to several parties' arguments,⁷⁹ to consider marketplace conditions for these services broadly.⁸⁰ In this regard, as we find below, competition for these enterprise

⁷⁰ *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.177; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18322, para. 57, n.164 (2005) (*SBC-AT&T Order*); see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷¹ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 20 FCC Rcd 27000, 27003, para. 6, n.22 (2002).

⁷² *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.178; *SBC-AT&T Order*, 20 FCC Rcd at 18322, para. 57, n.165; see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷³ *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.179; *SBC-AT&T Order*, 20 FCC Rcd at 18322, para. 57, n.166; see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁴ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A. OC is an abbreviation standing for "optical carrier." An OC-3 transmits at 155 megabits per second; an OC-192 transmits at approximately 10 gigabits per second (gbps). See HARRY NEWTON, *NEWTON'S TELECOM DICTIONARY*, 653, 654 (22d ed., 2006).

⁷⁵ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁶ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁷ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁸ See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5698-99, para. 65.

⁷⁹ See, e.g., Broadview Comments at 28 (claiming that AT&T does not provide evidence for the Commission to determine the relevant geographic market and simply claim that there is a national market for broadband products); COMTEL Comments at 11.

⁸⁰ See AT&T Petition at 5 (stating that Verizon's Petition demonstrated that "broadband competition is national in scope and is not limited to Verizon's territory or the territory of any specific BOC"); Qwest Reply at 6; Verizon Reply at 17-18 (claiming that the Commission may consider a national broadband market based on its analysis in the *Wireline Broadband Internet Access Broadband Order*, the *Triennial Review Order*, the *271 Broadband Forbearance Order*, and the *Cable Modem Declaratory Ruling*). Verizon Sept. 4, 2007 *Ex Parte* Erratum at 5-8. (continued....)

broadband services tends to be based on either competitive deployment of facilities or use of special access inputs. We note that the relief we grant AT&T excludes TDM-based, DS-1 and DS-3 special access services,⁸¹ and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.⁸² We also continue to believe, as the Commission determined in the *Wireline Broadband Internet Access Services Order*, that it is appropriate to view a broadband marketplace that is emerging and changing, such as we find true here, from the perspective of the larger trends that are shaping the marketplace.⁸³ Thus, in the *Wireline Broadband Internet Access Services Order*, the Commission analyzed competitive conditions for broadband Internet access services without regard to specific, identified geographic markets, finding that relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development.⁸⁴ Similarly, the Commission relied on such an approach in the *Section 271 Broadband Forbearance Order* when – after evaluating both mass market and enterprise broadband competitive conditions generally – it granted the BOCs forbearance from access obligations for broadband loops and packet switching.⁸⁵ The similarities we find between the characteristics of the present marketplace as emerging and changing and the markets at issue in those prior orders suggest that it is appropriate for us to look more broadly at competitive trends without regard to specific geographic markets.⁸⁶

(Continued from previous page)

We note that the Commission's forbearance analysis is informed by its traditional market power framework, where the Commission has noted that competitive analyses generally should focus on individual customer locations, but for reasons of administrative practicality may be aggregated and evaluated on a broader geographic basis. See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5700, para. 68. Moreover, we note that, although the Commission's analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis, it is not bound by that framework. As the Commission stated in the *Qwest Omaha Order*, while it "look[s] to the Commission's previous caselaw on dominance for guidance," the traditional market power inquiry does not "bind [the Commission's] section 10 forbearance analysis." *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19423-25, paras. 14, 17, n.52 (2005) (emphasis in original) (*Qwest Omaha Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁸¹ AT&T excludes "traditional TDM-based special access services used to serve business customers, such as DS1 and DS3 special access circuits," from the scope of their broadband relief request. See AT&T Petition at 5 (requesting relief from the "application of Title II and *Computer Inquiry* requirements to the BOCs' non-TDM based broadband transmission services"); Legacy BellSouth Petition at 7-8 (stating that Verizon's forbearance request excluded "TDM-based special access services" and that BellSouth seeks "the same relief" granted Verizon).

⁸² Moreover, as discussed below, concerns regarding existing regulation of TDM special access inputs are better addressed in the pending rulemaking context. See *infra* para. 33.

⁸³ *AT&T-BellSouth Order*, 22 FCC Rcd at 5698-99, para. 65 & n.183 (discussing the marketplace evolution for these types of services); Verizon Sept. 4, 2007 *Ex Parte* Erratum; Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at 4-6 (describing how "the technology used to provide the broadband services at issue here '[is] fundamentally changing' in ways that are 'breaking down the formerly rigid barriers that separate one network from another'") (citations omitted); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁸⁴ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁸⁵ See *271 Broadband Forbearance Order*, 19 FCC Rcd at 21496, para. 1 (granting forbearance relief for fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching); see also *EarthLink v. FCC*, 562 F.3d at 8 (upholding the Commission's decision in the *Section 271 Broadband Forbearance Order* as a reasonable interpretation of the forbearance statute).

⁸⁶ Certain commenters seek to distinguish the manner in which the Commission conducted its analysis in the *Wireline Broadband Internet Access Services Order* on the basis of the evidence of the intermodal competition cited (continued....)

21. Moreover, in the *ACS Dominance Forbearance Order*, the Commission found that many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁸⁷ Viewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use AT&T's broadband services to connect geographically-dispersed locations.⁸⁸ Many of these customers, moreover, have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁸⁹ Other enterprise customers have more regional or localized operations, but even these customers are able to solicit telecommunications services from a range of potential providers. Indeed, providers of these services often are able to self-deploy or obtain from competitive LECs the telecommunications services and facilities needed to meet potential customers' telecommunications requirements. Where self-deployment and purchasing from competitive LECs are not options, potential providers may obtain unbundled network elements (UNEs) from the incumbent LEC to meet these customers' needs.⁹⁰

22. Viewed on this basis, and consistent with the Commission's findings in several recent orders, we find that a number of entities currently provide broadband services in competition with AT&T's services.⁹¹ There are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's

(Continued from previous page)

in that proceeding. See, e.g., Broadview Comments at 25. To the extent that competition in the emerging market for enterprise broadband services addressed here relies in part on third parties' wholesale inputs, rather than competitors' own facilities, we do not find that to be a distinguishing factor in terms of the Commission's approach of viewing emerging and changing broadband markets from the perspective of the larger trends that are shaping the marketplace, although we do account for those factors in the relief ultimately granted and denied. The Commission relied on the presence of intermodal competitors in the emerging wireline broadband Internet access services market in granting relief from the compulsion to offer as telecommunications services the telecommunications inputs necessary for wireline broadband Internet access service. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14895, para. 79. Here, however, in addition to the potential for competitors to deploy their own facilities for the provision of the relevant enterprise broadband services, we observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.

⁸⁷ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149, at para. 101 (rel. Aug. 20, 2007) (*ACS Dominance Forbearance Order*). Thus, based on our discretion to tailor our forbearance analysis, we find that an analysis of the AT&T-specified services on a national basis is the proper approach, and reject arguments raised regarding the geographic market definition. See *EarthLink v. FCC*, 462 F.3d at 9.

⁸⁸ E.g., AT&T Petition at 13 (describing the needs of customers operating on a nationwide basis).

⁸⁹ See Verizon Sept. 4, 2007 *Ex Parte* Erratum at 3.

⁹⁰ The record indicates that the broadband services for which AT&T is seeking relief are purchased predominantly by enterprise customers, not by their competitors as wholesale inputs. See, e.g., Legacy BellSouth Reply at 23. Granting the requested relief, however, will not affect these competitors' ability to obtain traditional DS1 and DS3 special access services or UNEs as inputs. Nor will it affect the competitors' ability to self-deploy their own OCN facilities and services or to obtain them from non-incumbents.

⁹¹ See *AT&T-BellSouth Order*, 22 FCC Rcd at 5708, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18474-75, para. 76 (2005) (*Verizon-MCI Order*); *Qwest Section 272 Sunset Forbearance Order*, 20 FCC Rcd at 5244, para. 30; see also Verizon Sept. 4, 2007 *Ex Parte* Erratum, attaching Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at 7-9.

service territory.⁹² These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against AT&T.⁹³

23. We recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services. However, we note that other available data suggest that there are a number of competing providers for these types of services nationwide and the marketplace generally appears highly competitive.⁹⁴ In particular, the record shows there are many significant providers of Frame Relay services, ATM services, and Ethernet-based services.⁹⁵ Moreover, as we discuss below, we find that competitors either are providing, or readily could enter the market to provide, these services. In light of these factors and the emerging and evolving nature of this market, and consistent with traditional market power analysis, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event.⁹⁶

⁹² See *AT&T-BellSouth Order*, 22 FCC Rcd at 5707-08, para. 80; *SBC-AT&T Order*, 20 FCC Rcd at 18331-32, para. 73; see also *Verizon-MCI Order*, 20 FCC Rcd at 18473-74, para. 74.

⁹³ Competitors are rapidly deploying new IP-based networks and services along with other technologies to satisfy customer demand. See Telecommunications Industry Association, TIA's 2005 Telecommunication Market Review and Forecast, at 121 (2005) (stating that IP-VPNs have emerged as a lower-cost alternative to Frame Relay service). Frame Relay growth has come to a near standstill as lower cost alternatives have emerged, and unified messaging, voice over IP (VoIP), multi-cast video and IP-based network security services, not suitable for Frame Relay applications, are increasingly in demand. *Id.* at 120. As discussed in prior Commission orders, there are numerous types of business models supporting competition for enterprise customers. Some competitive LECs market integrated voice and data services to enterprise customers, primarily through leasing high-capacity loops from the incumbent LECs as unbundled network elements (UNEs) and then using the leased loops to provide a bundled offering including voice, data, and Internet access. See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17014, para. 48 n.159 (observing that companies such as ITC/Deltacom, NewSouth, and Cbeyond have focused on providing integrated services to the business market).

⁹⁴ See, e.g., Verizon Sept. 4, 2007 *Ex Parte* Erratum, Verizon WC Docket No. 04-440 Feb. 7 Letter at 7 n.13 (citing a June 2005 analyst's estimated market shares for "primary" providers of enterprise data services: AT&T 35%, MCI 28%, Sprint 12%, incumbent LEC 7%, Other 19%); *id.*, Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at 7 n.14 (citing a June 2005 analyst's estimated market shares for "secondary" providers of enterprise data services: Sprint 31%, AT&T 16%, incumbent LEC 16%, MCI 6%, Qwest 6%, Other 25%); see generally *id.*, Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at Attach. 2 (citing a November 2003 analyst report estimating market shares of top providers of services to large enterprise customers: AT&T 26%, MCI 14%, Sprint 8%; and forecasting anticipated market shares for subsequent years). While these data are not ideal, for example because they predate the recent BOC/interexchange carrier mergers, and the underlying information and methodologies are not available, as noted above, we do not give significant weight to such static market share information in any event.

⁹⁵ See AT&T Petition at 12 (stating that in addition to the numerous companies that offer broadband transmission services identified by Verizon in its forbearance filings, competitors include "system integrators and other non-facilities based competitors that are able to purchase wholesale frame relay and ATM service at highly competitive rates"); Legacy BellSouth Petition at 13 (arguing that Verizon demonstrated that "the BOC is nothing more than a member of one group of suppliers that offer broadband services"); Broadview Comments at 11 (stating "it is of course true that the retail market for packetized and TDM-based special access services is competitive"); Time Warner Telecom Comments at 10 (arguing that AT&T is trying to rely on the retail competition for these services as a basis for forbearance relief); Sprint Nextel Comments at 13-15 (same); see also *Section 271 Broadband Forbearance Order*, 20 FCC Rcd at 21505-06, para. 22 (citing competition from competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers).

⁹⁶ See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation To WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18036-37, paras. 17-18 (1998); see also DOJ/FTC Horizontal Merger Guidelines, § 1.521 ("Market concentration and (continued....)

However, our findings here concerning the granularity of competition in specific geographic markets and the level of competition for enterprise broadband services do not prejudice the issue of the appropriate level of market analysis for services subject to the open Special Access Rulemaking proceeding, WC Docket No. 05-25.⁹⁷

24. We also observe the sophistication of the enterprise customers that tend to purchase broadband telecommunications services. The Commission consistently has recognized that customers that use specialized services, similar to the AT&T-specified services, demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge.⁹⁸ These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.⁹⁹ This shows that customers are likely to make informed choices based on expert advice about service offerings and prices, and thus suggests that these users also are likely to be aware of the choices available to them.¹⁰⁰ The Commission has further found that the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks.¹⁰¹ These services equate to substantial telecommunications expenditures for large enterprise customers, which supports the notion that these customers will continue to deal at the most sophisticated level with the providers of these services.¹⁰² Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

25. We further find that competitors can readily respond should AT&T seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its enterprise broadband services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may

(Continued from previous page)

market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.”). We thus reject commenters' calls to base our analysis on such information. See, e.g., AdHoc Reply at 13-14.

⁹⁷ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, fn. 43.

⁹⁸ See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5699, para. 66; *SBC-AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon-MCI Order*, 20 FCC Rcd at 18465, para. 60; *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 17 (2001) (*CPE Bundling Order*); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3306, para. 65 (1995) (*AT&T Reclassification Order*) (citing *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991)).

⁹⁹ See *AT&T-BellSouth Order*, 22 FCC Rcd at 5708-09, paras. 81-82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, paras. 74-75; see also *Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰⁰ See *AT&T-BellSouth Order*, 22 FCC Rcd at 5708-09, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; see also *Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰¹ *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

¹⁰² See AT&T Petition at 5-6; see also Legacy BellSouth Petition at 12 (stating that customers of these broadband transmission services, “typically exert control over their buying practices through a variety of mechanisms to ensure quality and price” such as request for proposals and competitive bids); *Verizon Sept. 4, 2007 Ex Parte Erratum* at 3.

rely on special access services purchased from the incumbent LEC at rates subject to price regulation.¹⁰³ In this regard, we note that the relief we grant in this Order excludes TDM-based, DS-1 and DS-3 special access services.¹⁰⁴ Moreover, as we discuss in more detail below, competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services in AT&T's incumbent LEC service areas.¹⁰⁵ These conclusions are consistent with our analysis of retail enterprise services in other recent orders, where the Commission found that "so long as competitive choices remain" for retail enterprise services, large enterprise "customers should seek out best-priced alternatives," limiting the ability of a provider "to raise and maintain prices above competitive levels."¹⁰⁶

26. We reject Time Warner Telecom's assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers.¹⁰⁷ We find that assertion to be inconsistent with Time Warner Telecom's public statements that Time Warner Telecom can "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even "where it may be uneconomical" to build facilities connecting Time Warner Telecom's network to the customers' premises.¹⁰⁸ Indeed, we observe that Time Warner Telecom has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).¹⁰⁹ We also are unpersuaded by

¹⁰³ See, e.g., Sprint Nextel Comments at 6 (stating that special access inputs are "critical" inputs to the broadband services provided by incumbent LEC competitors); Time Warner Telecom Comments at 12-16 (arguing that many competitors rely on special access facilities to serve broadband services to enterprise customers); Broadview Comments at 25-26 (arguing that competitors are dependent on the incumbent LECs' special access services"); Mobile Satellite Ventures Subsidiary Reply at 2 (stating that it relied on special access inputs from the incumbent LECs to provide mobile satellite services). We thus find inapposite commenters' arguments that AT&T has not reasonably negotiated alternative access arrangements for broadband Internet access services since the Commission issued the *Wireline Broadband Internet Access Services Order*. See EarthLink Comments at 15-18 (claiming that EarthLink and New Edge have been subjected to "blatantly unreasonable and anticompetitive conduct" from AT&T and Legacy BellSouth following the Commission's *Wireline Broadband Internet Access Services Order*). As an initial matter, AT&T and Legacy BellSouth contend that they have, in fact, reasonably sought to negotiate alternative access arrangements. AT&T Reply at 34 (stating that it is involved in ongoing negotiations with EarthLink and that it seeks to maintain a commercial relationship); Legacy BellSouth Reply at 19-20 (claiming that EarthLink's allegations omit details of the negotiations regarding a customized regional broadband aggregation network). We need not resolve that dispute in any event, however, because competitors here continue to have access to wholesale inputs on a regulated basis, in addition to the potential to self-deploy such facilities in certain circumstances. While we note that AT&T has phase II pricing flexibility in certain markets where the Commission has determined the competitive triggers have been met, this does not alter our ultimate conclusions for the reasons described above. See *supra* n.94.

¹⁰⁴ AT&T excludes traditional, TDM-based, DS1 and DS3 services from broadband transmission services. See *supra* n.4.

¹⁰⁵ See *infra* para. 38.

¹⁰⁶ See *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5608-09, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 46.

¹⁰⁷ Time Warner Telecom Comments at 16-20.

¹⁰⁸ *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, Time Warner Telecom Press Release (June 6, 2006), available at: <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

¹⁰⁹ Specifically, Time Warner Telecom cites two declarations filed in the AT&T-BellSouth merger proceedings. See Time Warner Telecom Comments at 15-20 (citing Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. Reply Decl. of Graham Taylor (Taylor WC Docket No. 06-74 Reply Decl.); Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Attach. Reply Decl. of Parley C. Casto (Casto WC Docket No. 06-74 Reply Decl.)). These declarations indicate that Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services. See Taylor WC Docket No. 06-74 Reply Decl. at para. 9 ("To the extent that (continued....)

Time Warner Telecom's concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.¹¹⁰ We agree that this argument is undercut by the fact that providers have been successfully competing for Ethernet services customers by relying on TDM inputs.¹¹¹ We also reject Time Warner Telecom's argument that the fixed and variable mileage rates charged by the BOCs make it uneconomical for competing carriers to rely on TDM inputs, and that forbearance should be denied because the BOCs therefore have monopoly power over such inputs.¹¹² Rather, we agree with Legacy BellSouth that the increased mileage costs for providing longer connections has not prevented Time Warner Telecom from using Ethernet over TDM arrangements; and further, that Time Warner Telecom could minimize those charges by interconnecting at additional points.¹¹³ In addition, we observe that all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities, and we anticipate that competitors will explore various options in seeking to provide enterprise broadband services. For example, obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits.¹¹⁴ Further, any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.¹¹⁵

27. In addition, to the extent that commenters argue for changes in the existing regulation of special access services other than those for which we grant relief, as in prior proceedings, we find that such concerns are more appropriately addressed on an industry-wide basis in pending rulemaking proceedings. As the Commission has held, "[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors" using special access inputs, "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing."¹¹⁶ By addressing such issues in the context of a

(Continued from previous page)

TWTC has been able to deploy Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities.") *cited in* Time Warner Telecom Comments; Casto WC Docket No. 06-74 Reply Decl. at para. 10 ("Numerous Ethernet providers, including TWTC, AT&T, and others, offer retail Ethernet services" by using "basic DS1 or DS3 special access circuits.").

¹¹⁰ See, e.g., Time Warner Telecom Comments at 18.

¹¹¹ See, e.g., Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹¹² Time Warner Telecom Comments at 18-19.

¹¹³ Legacy BellSouth Reply Comments at 10-11.

¹¹⁴ See Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹¹⁵ For example, Time Warner Telecom notes that it would need to obtain two DS3s to provide a 50 Mbps Ethernet loop because DS3s provide approximately 45 Mbps of bandwidth. Time Warner Telecom Comments at 17. However, Ethernet supports data transfer rates in specific increments of 10 Mbps, 100 Mbps, and 1 Gbps. See NEWTON'S TELECOM DICTIONARY at 363, 364. Thus, depending upon the capacity of service desired by a particular customer, it could well be necessary to purchase excess capacity of a wholesale Ethernet service, as well.

¹¹⁶ *AT&T-BellSouth Order*, 22 FCC Rcd at 5695-96, para. 60; *SBC-AT&T Order*, 20 FCC Rcd at 18320, para. 55; *Verizon-MCI Order*, 20 FCC Rcd at 18462, para. 55; *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0001656065, et al., WT Docket No. 04-70; *Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses*, File Nos. 0001771442, 0001757186, and 0001757204, WT Docket No. 04-254; *Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21592, para. 193 (2004). Moreover, we note that Alpheus's concerns regarding the potential for increased (continued....)

rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly situated incumbent LECs. For the same reasons, to the extent that commenters desire expanded access to section 251 UNEs under the Commission's generally applicable unbundling rules, we find it more appropriate to consider such concerns in the context of an industry-wide proceeding applicable to all similarly situated carriers, rather than in the context of a forbearance proceeding.¹¹⁷

28. Because our grant of forbearance excludes traditional TDM-based, DS1, or DS3 special access services, we reject certain commenters' concerns regarding the potential impact of forbearance on rural access to the Internet backbone.¹¹⁸ The record makes clear that rural carriers are largely using TDM-based DS1 and DS3 special access services to access the Internet backbone today,¹¹⁹ and the forbearance relief granted in this Order does not affect those services. Accordingly, rural incumbent LECs will continue to have access to the Internet backbone using those regulated special access services. While the rural carriers' concerns regarding access to the Internet backbone using packetized services appear largely speculative based on the record here, as in the *AT&T-BellSouth Order*, we commit to monitor the competitive concerns of rural carriers with respect to access to the Internet backbone.¹²⁰ We find on this record, however, that the limited forbearance relief we grant in this order will not adversely affect rural incumbent LECs' ability to access the Internet backbone.

29. We are convinced that customers would benefit from the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages. AT&T asserts that tariffing and cost support requirements limit its ability to negotiate service arrangements tailored to specific customer needs and to respond to new service offers from unregulated competitors because it must currently provide advance notice of any tariff price changes.¹²¹ AT&T further submits that the ability to negotiate in an unencumbered fashion is not only essential to enable competition in the broadband market but to encourage investment in, and development of, new broadband services.¹²² In particular, as AT&T argues, these requirements impose significant unnecessary transactions costs on its broadband business.¹²³

30. In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission

(Continued from previous page)

incentives for AT&T and Legacy BellSouth to discriminate if their merger was approved were addressed in that proceeding. See *AT&T-BellSouth Order*, 22 FCC Rcd at 5751-55, paras. 183-89.

¹¹⁷ See, e.g., Broadview Reply at 7-8; see also 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

¹¹⁸ See NTCA Comments at 2 (arguing that forbearance will saddle rural areas with obsolete TDM connections for Internet backbone); OPASTCO Comments at 3, 6 (claiming that rural incumbent LECs need access to the Internet backbone based on reasonable and nondiscriminatory rates and terms in order to provide their customers with high-quality, affordable advanced services); NTCA Reply at 3 (arguing that if forbearance is granted, the BOCs could refuse to provide their transport services to the Internet backbone to rural incumbent LECs, unless these incumbent LECs agree to purchase both this transport and Internet backbone capacity from the BOC).

¹¹⁹ NTCA Comments at 2 (stating many rural incumbent LECs connect to the Internet using TDM circuit).

¹²⁰ *Id.* We note that the Commission has the option of revisiting this forbearance ruling should circumstances warrant. See, e.g., *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5235, para. 55.

¹²¹ AT&T Petition at 7 (stating that tariffing requirements deny AT&T the ability to negotiate private, customer-specific contracts for broadband services); Legacy BellSouth Petition at 5 (arguing that the current regulatory regime denies Legacy BellSouth the flexibility that its competitors currently enjoy).

¹²² AT&T Petition at 6; see also Legacy BellSouth Petition at 5 (arguing that the current Title II and *Computer Inquiry* regime slows "if not impedes" Legacy BellSouth's innovation and investment).

¹²³ AT&T Petition at 6.

Services, Optical Network Services, and Wave-Based Services, as offered by AT&T today, is not necessary to ensure that AT&T's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. The competitive conditions persuade us that the contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible. The Commission has recognized that tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, and that they become unnecessary in a marketplace where the provider faces significant competitive pressure.¹²⁴

31. For the same reasons, we find that continuing to subject AT&T to dominant carrier regulation in regard to its existing non-TDM-based, packet-switched broadband services therefore is no longer appropriate in light of the market conditions. Such regulation is not necessary to ensure that AT&T's charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as AT&T is subject to the same treatment as the nondominant competitors that provide these services.¹²⁵

32. We also find that AT&T faces sufficient competition in its provision of the specified optical transmission services because competing carriers are able to economically deploy OCn-level facilities to compete with AT&T's offerings. Specifically, we find, consistent with the Commission's findings in the *Triennial Review* and the *Triennial Review Remand Orders*, that there is substantial deployment of competitive fiber loops at OCn capacity and that competitive carriers are often able to economically deploy these facilities to large enterprise customers.¹²⁶ We further find, consistent with this precedent, that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.¹²⁷ Our precedent also makes clear that large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.¹²⁸ Evidence in the record here likewise is consistent with those conclusions.¹²⁹

¹²⁴ See *ACS Dominance Forbearance Order*, FCC 07-149, at para. 103; see also *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738-68, paras. 14-66 (1996) (*Interexchange Forbearance Order*).

¹²⁵ See *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As discussed in part III.D.3 & III.D.4, below, we agree with Time Warner Telecom's argument that AT&T should remain subject to nondominant carrier regulation in their provision of these services. See Time Warner Telecom Comments at 26-28.

¹²⁶ *Triennial Review Order*, 18 FCC Rcd at 17169, 17221, paras. 315, 389 (finding that requesting carriers are not impaired without OCn or SONET interface transport); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 183. AT&T Petition at 5 (stating that many suppliers compete to provide broadband services such as ATM, Frame Relay, Gigabit Ethernet, IP-enabled service and OCn-level transmission services); Legacy BellSouth Reply at 28 (explaining that alternative access vendors "dominate the market for OCn level circuits in BellSouth's region"); EarthLink Comments at 20 (arguing that the BOCs control almost all the essential inputs in their regions). We note that our reliance on the *Triennial Review Order* and the *Triennial Review Remand Order* is for purposes of the findings of fact made therein and not on the impairment analysis *per se*. See Sprint Comments at 18 (arguing that any reliance in this proceeding on the *Triennial Review Order* would be misplaced as the analysis conducted in that order was driven by section 251(c), as opposed to the section 10 forbearance analysis of the current proceeding); see also Broadview Rely Comments at 10 n.30.

¹²⁷ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹²⁸ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹²⁹ See, e.g., Legacy BellSouth Reply at 28 (citing RHN study estimating that 79% of the OCn circuits provisioned in Legacy BellSouth's region do not rely on Legacy BellSouth facilities); see also AT&T Reply at 24-25 (listing various competitive carriers' public statements regarding their fiber builds).

Thus, we find it no longer appropriate to subject AT&T to dominant carrier regulation for these non-TDM-based, optical services.¹³⁰

33. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting AT&T relief from that regulation as it applies to the packet-switched and optical transmission services for which AT&T seeks forbearance. In particular, the Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings, and impose other unnecessary costs.¹³¹ We find that continuing to apply dominant carrier regulation to the AT&T-specified broadband services would have each of these effects. Specifically, tariffing these services reduces AT&T's ability to respond in a timely manner to its customers' demands for innovative service arrangements tailored to each customer's individualized needs.¹³² In addition, by mandating that AT&T provide advance notice of changes in its prices, terms, and conditions of service for these services, tariffing allows AT&T's competitors to counter innovative product and service offerings even before they are made available to the public. In contrast, detariffing of these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs.¹³³ Moreover, relief from advance notice requirements and cost-based pricing requirements would enable AT&T to respond quickly and creatively to competing service offers.¹³⁴ We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the AT&T-specified broadband services are just and reasonable and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow AT&T to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which AT&T offers these services.¹³⁵

34. We disagree with the parties that argue AT&T already has sufficient relief, through our pricing flexibility regime, to meet their customers' needs and compete effectively.¹³⁶ Although AT&T has obtained pricing flexibility relief for certain interstate access services,¹³⁷ that relief is both limited in scope and limited to certain geographic areas.¹³⁸ As the Commission has stated before in reducing regulatory requirements where competition is present, there comes a point at which constraints become

¹³⁰ AT&T has not asked for, nor are we granting, forbearance for the traditional, TDM-based, DS1 and DS3 special access services that the Commission has previously found that competitors rely on to serve enterprise customers. See AT&T Petition at 9; Legacy BellSouth Petition at 7.

¹³¹ See, e.g., *AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

¹³² AT&T Petition at 7; see also *Interexchange Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

¹³³ See, e.g., AT&T Petition at 19 (stating that competitive forces will ensure just and reasonable rates and broadband deployment); Legacy BellSouth Petition at 13 (same).

¹³⁴ See, e.g., AT&T Petition at 7; Legacy BellSouth Petition at 5.

¹³⁵ See *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27012-13, para. 22.

¹³⁶ Alpheus Comments at 12-13; Broadview Reply at 12.

¹³⁷ See, e.g., *Ameritech Operating Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 06-8, 21 FCC Rcd 5172 (WCB 2006). Most carriers did not include packet-switched services in price caps, and thus these services could not qualify for pricing flexibility. The Commission subsequently found that these procedural circumstances should not act to preclude AT&T from obtaining pricing flexibility for these services. *SBC Waiver Order*, 22 FCC Rcd at 7227-28, para. 7 n.30.

¹³⁸ See generally *Pricing Flexibility Order*, 14 FCC Rcd 14221. Pricing flexibility permits the LEC to enter into more individualized relationships with its customers. Price cap LECs may obtain pricing flexibility in two separate phases, each on an MSA basis.

counter-productive, especially in terms of carriers' ability to respond to customer needs.¹³⁹ This is particularly true for the broadband services for which AT&T seeks relief because, unlike many of its competitors, AT&T is limited in its ability to negotiate arrangements with customers that operate on a nationwide basis. Even when price cap carriers are permitted to tailor services to their customers through individually negotiated contracts under the *Pricing Flexibility Order*, our rules still require these contract-based tariffs to be filed with specified information that is available publicly to any party, including competitors.¹⁴⁰

35. We find that eliminating these requirements would make AT&T a more effective competitor for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace,¹⁴¹ thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly discriminatory. Forbearing from dominant carrier regulation of the AT&T-specified services will permit customers to take advantage of a more market-based environment for these highly specialized services and allow AT&T the flexibility necessary to respond to dynamic price and service changes often associated with the competitive bidding process. In such a deregulated environment, the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. AT&T will continue to be subject to sections 201 and 202 of the Act in its provision of its specified broadband services, which, among other things, mandate that AT&T provide interstate telecommunications services upon reasonable request and prohibit it from acting in an unjust or unreasonable manner or otherwise favoring particular entities in the provision of "like" services provided to other entities.¹⁴²

36. By virtue of the relief granted, AT&T may detariff the specified broadband services, but the Section 201 and 202 standards and the formal complaint process in Section 208 of the Act and Sections 1.720 through 1.735 of the Commission's rules will continue to apply to those service offerings. We expect that any complaint pertaining to services covered by this Order will be resolved within five months, as prescribed by Section 208 (b)(1) of the Act.¹⁴³

37. We also find that continued application of our dominant carrier discontinuance rules to the AT&T-specified broadband services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as AT&T is subject to the same treatment as nondominant carriers in relation to these services.¹⁴⁴ We conclude that subjecting AT&T to a 60-day automatic grant period for discontinuance of the existing specified broadband services, and a 30-day comment period for notice to affected customers, is not necessary under section 10(a)(1), where nondominant carriers providing those same services are subject to a 31-day automatic grant period and a 15-day comment period. However, to maintain sufficient customer protection and ensure the justness and reasonableness of AT&T's practices in connection with these services, we predicate this finding upon AT&T's compliance with the discontinuance rules that apply to nondominant carriers in the event it seeks to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which

¹³⁹ See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14232-33, para. 17.

¹⁴⁰ 47 C.F.R. § 61.55 (requirements for contract-based tariffs).

¹⁴¹ See *supra* paras. 35-39.

¹⁴² 47 U.S.C. §§ 201-02.

¹⁴³ Section 208(b)(1) states "Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed."

¹⁴⁴ 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

we grant relief.¹⁴⁵ Similarly, we forbear from applying our domestic streamlined transfer of control rules to AT&T as a dominant carrier of these services, conditioned upon treatment of AT&T as a nondominant carrier for these services.¹⁴⁶

38. We reject the New Jersey Rate Counsel's argument that the Commission should impose the requirements of section 64.1903 of the Commission's rules on AT&T in the event we grant it forbearance relief in this proceeding.¹⁴⁷ That rule imposes structural separation requirements on independent incumbent LECs.¹⁴⁸ In the *Section 272 Sunset Order*, we rejected a similar argument from the New Jersey Division of Rate Counsel in connection with our determination that the BOCs should not be subject to the section 64.1903 requirements in their provision of in-region, long distance services.¹⁴⁹ We found that, as applied to those services, the section 64.1903 requirement would impose costs that would make the BOCs less effective marketplace competitors, and instead we adopted targeted safeguards to address potential competitive concerns.¹⁵⁰ Consistent with that order, we find here that, as applied to AT&T's existing specified broadband services, the section 64.1903 requirements would impose significant costs. Indeed, they would require AT&T to restructure its in-region, broadband telecommunications operations at great expense and in a less efficient manner.¹⁵¹ We find that these costs far exceed any potential benefits and therefore decline to impose the section 64.1903 requirements on AT&T in its provision of its existing specified broadband services, given the alternative targeted safeguards that apply as a result of the *Section 272 Sunset Order*. For the same reason, we decline to impose those requirements on AT&T's independent incumbent LEC affiliate, SNET.¹⁵²

39. Further, while we do grant forbearance from dominant carrier regulation for the AT&T-specified services, we do not grant forbearance from Title II as a whole, but instead ensure that AT&T remains subject to the same regulatory obligations applicable to nondominant carriers.¹⁵³ As the

¹⁴⁵ 47 C.F.R. § 63.71; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁴⁶ 47 C.F.R. § 63.03; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁴⁷ New Jersey Rate Counsel Comments at 8 (arguing that application of these requirements is necessary deter the BOCs from engaging in discriminatory behavior).

¹⁴⁸ Under section 64.1903 of our rules, an independent incumbent LEC that provides in-region, interstate, interexchange telecommunications services or in-region, international services is required to provide such services through a separate affiliate and such affiliate must maintain separate books of account from the independent incumbent LEC and to purchase services from the independent incumbent LEC pursuant to the incumbent LEC's tariffs. 47 C.F.R. § 64.1903(a). Section 64.1903 of the Commission's rules also forbids incumbent LECs' affiliates from jointly owning transmission or switching facilities with the independent incumbent LEC. 47 C.F.R. § 64.1903(a).

¹⁴⁹ *Section 272 Sunset Order*, FCC 07-159, at para. 85.

¹⁵⁰ *Id.*

¹⁵¹ See *Section 272 Sunset Order*, FCC 07-159, at paras. 85-86 (discussing the costs and burdens of section 64.1903 structural separation requirements).

¹⁵² See New Jersey Rate Counsel Comments at 8. We note that the *Section 272 Sunset Order* eliminated these separate affiliate requirements for AT&T's independent incumbent LEC affiliate, SNET. See *Section 272 Sunset Order*, FCC 07-159, at paras. 85-86.

¹⁵³ See *infra* parts III.D.3 & III.D.4. This should address commenters' concern regarding general Title II regulations including, for example, universal service, interconnection, customer proprietary network information (CPNI), and disability access. See Sprint Nextel Comments at 17; COMPTel Comments at 18; Broadview Comments at 5, 26-28; Letter from Daniel L. Brenner, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 6, 2007); Letter from Mary C. Albert, COMPTel, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. (continued....))

Commission concluded in the *Qwest Section 272 Sunset Forbearance* and the *ACS Dominance Forbearance Order*, “dominant carrier regulation is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an incumbent LEC’s] control of any bottleneck access facilities that [the incumbent LEC’s] competitors must access in order to provide competing services.”¹⁵⁴ We find that, to the extent dominant carrier regulation of the AT&T-specified broadband services addresses any exclusionary market power AT&T may have in relation to those services, the burdens imposed by that regulation exceed its benefits.¹⁵⁵

40. Our forbearance grant is restricted to broadband services that AT&T currently offers and lists in its petitions. We believe that limiting our forbearance grant to the identified services that are currently offered is consistent with our analysis under the forbearance framework. We do not know the precise nature of such future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here.¹⁵⁶ Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).¹⁵⁷

41. Similarly, we decline to extend the forbearance relief granted in this Order to carriers other than AT&T.¹⁵⁸ For similar reasons to those noted above, we find it appropriate to limit forbearance to AT&T. Just as we do not know the precise nature and competitive conditions associated with other possible services that AT&T might some day offer, the record before us does not provide sufficient information regarding the nature and competitive conditions associated with particular enterprise broadband services currently offered by other incumbent LECs. We find that the better course is to limit our forbearance grant to AT&T, without prejudice to the ability of other carriers to file their own forbearance petitions showing that granting them relief from dominant carrier regulation for specific broadband telecommunications services would meet the statutory forbearance criteria, or to seek such relief in the rulemaking context or through petitions to be declared nondominant.¹⁵⁹ We also agree with NTCA that certain carriers may not want to offer their broadband telecommunications free of dominant

(Continued from previous page)

13, 2007); Letter from William H. Weber, Vice President and Corporate Counsel, Cbeyond, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 13, 2007).

¹⁵⁴ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Red at 5233, para. 52.

¹⁵⁵ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Red at 5233, para. 52.

¹⁵⁶ Cf. 47 U.S.C. § 160(a) (directing the Commission to forbear with respect to a particular service or class of services).

¹⁵⁷ *Qwest Omaha Order*, 20 FCC Red at 19438, para. 50 (denying Qwest’s petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

¹⁵⁸ See AT&T Petition at 1, 7-11 (seeking relief for itself and other BOCs); Legacy BellSouth Petition at 2, 6-9 (seeking relief for itself and similarly situated carriers). See also Cincinnati Bell Telephone Company Comments at 2 (supporting forbearance relief for all incumbent LECs); Hawaiian Telcom Reply at 1-2 (same).

¹⁵⁹ We note that GCI argues that the Commission lacks the authority to grant forbearance relief to any carriers other than those that file petitions for forbearance. GCI Reply at 3. Because we decline in this Order to extend our forbearance grant to carriers other than AT&T, we need not address this argument. As noted below, however, we anticipate addressing Verizon’s petition, as well as the other forbearance petitions seeking comparable relief, shortly. See *infra* para. 51.